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OF THE
United States

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No. 74-1055

W. T. STONE, Warden,
Petitioner,

vs.

LLOYD CHARLES POWELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

CLOSING BRIEF FOR THE PETITIONER

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Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev., pp. 451, 458-68 (1966) 27

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Schrock and Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L.Rev., pp. 251, 355-66 (1974) 16

Sherry, Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision, 48 Calif. L.Rev., pp. 557, 571 (1960) 19

Annual Report of the Director of the Administrative Office of the United States Courts—1974, p. 213 (1975) 32

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CLOSING BRIEF FOR THE PETITIONER

ARGUMENT

I

THE EXCLUSIONARY RULE DOES NOT REQUIRE SUPPRESSION OF EVIDENCE IN THIS CASE

Petitioner reiterates his position that the ordinance under which respondent was arrested is constitutional. In reply to respondent's various claims of unconstitutionality (RB 17-41), we submit that the ordinance was not impermissibly vague, did not create a presumption that loiterers commit crimes, and did not

relieve the prosecution of its burden of proving guilt beyond a reasonable doubt. The ordinance did not require a suspect to forfeit his privilege against self-incrimination and did not abridge the right to interstate travel. Assuming, without conceding, that the ordinance was constitutionally repugnant for one or more of the above reasons, the arresting officer could not reasonably have been charged with knowledge of the law's invalidity.

The information which the officer received from respondent during questioning was not coerced under the standards of the Fifth and Fourteenth Amendments. Hence, the information constituting probable cause was lawfully obtained. The arrest was therefore valid.

Nor did the statute violate the Fourth Amendment, because the mere *enactment* of a law cannot transgress the terms of that Amendment, which governs searches and seizures. We acknowledge that the *implementation* of a statute can violate the Fourth Amendment. We have never contended that a statute can authorize an unreasonable search or seizure. However, the existence of a statute is relevant in determining whether a violation of the Fourth Amendment compels suppression of evidence. If the officer's reliance upon the statute was reasonable and in good faith, then suppression will have no deterrent value and will not vindicate the imperative of judicial integrity.

There is no merit to respondent's argument that suppression of evidence is necessary to deter legislatures from enacting invalid statutes (RB 48-50). That

purpose can be adequately served by the invalidation of the offending statute. Respondent's claim, that the ordinance was enacted to permit arrests and searches upon less than probable cause (RB 53 & n.26), is untenable. The ordinance was passed years before this Court's decision in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), and was based upon a model suggested by a distinguished commentator.

Also unsupportable is respondent's contention that it is impossible to attack the validity of a vagrancy law on appeal from a conviction for vagrancy because no one is ever prosecuted for that crime (RB 53-54). Empirical evidence establishes that persons are prosecuted for vagrancy and loitering; hence, attacks upon such statutes are possible.

Respondent's contention, that the case-or-controversy rule requires suppression of the evidence if the ordinance was invalid (RB 58-59), is premised upon his erroneous assumption that a violation of the Fourth Amendment *ipso facto* activates the exclusionary rule. Suppression of evidence is a societal, not a personal, right; if no purpose is served by suppression, then the violation, if any, of the Fourth Amendment in this case does not require exclusion of reliable evidence. The case-or-controversy requirement is satisfied by a determination of the relief to which respondent is entitled. Since suppression would serve no recognized purpose, respondent is entitled to no relief.

Alternatively, respondent argues that he should be granted a new trial because, as a "constitutional inno-

vator," he successfully challenged the validity of the ordinance under which he was arrested (RB 59-60). If he is not granted relief, respondent concludes, others who are similarly situated will have no incentive to attack the statutes authorizing their arrests. Petitioner replies that a person such as respondent, who is arrested for vagrancy but prosecuted for another, more serious, crime, will *always* have cause to challenge the vagrancy statute authorizing his arrest. The constitutionality of a statute is relevant to a determination of the existence of reasonableness and good faith. Thus, if an arrestee can prove the invalidity of the statute under which he was arrested, the burden will fall upon the State to establish that reliance upon the statute was reasonable and in good faith. If it cannot carry the burden, the defendant will prevail. We submit that the State has met its burden in this case.

A. The vagrancy ordinance is constitutional.

We reiterate our position, set forth in the Petitioner's Brief (pp. 49-53), that the ordinance was sufficiently precise to satisfy the due process requirement of fair notice and that it did not make innocent conduct unlawful. Turning to respondent's argument that the ordinance violated his privilege against self-incrimination (RB 17-21), we note that this Court has declared that an officer may make "reasonable inquiries" of those suspected of crime. *Terry v. Ohio,* 392 U.S. 1, 30 (1968). Certainly the questions posed by Officer Lattin regarding respondent's iden-

tity and the reason for his presence in Henderson must be considered constitutionally reasonable. *Cf. California v. Byers,* 402 U.S. 424 (1971).

Next, respondent argues that the ordinance created an invalid presumption that loiterers commit crimes (RB 21-22; *see Leary v. United States,* 395 U.S. 6, 29-53 [1969]) and permitted conviction without evidence establishing guilt beyond a reasonable doubt (RB 22). Preliminarily we observe that these contentions are raised for the first time, not having been argued before the District Court or Court of Appeals. This Court, following well-settled precedent, should decline to consider those new theories. *See Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958); *United States v. Fleischman,* 339 U.S. 349, 365 (1950); *Husty v. United States,* 282 U.S. 694, 701-02 (1931); *Duignan v. United States,* 274 U.S. 195, 200 (1927).

We nevertheless address the merits of respondent's claims. The ordinance creates no presumptions. There is no requirement that a jury presume a fact from facts proved at trial. *See Leary v. United States, supra,* 395 U.S. at 33-36. Had respondent been brought to trial for violation of the ordinance, the prosecution would have had to prove that he had wandered the streets without apparent business, and had refused to identify himself under circumstances indicating that identification was necessary to the public safety. Not only was it necessary that each element be proved rather than presumed, each had to be established beyond a reasonable doubt. The ordinance does not lessen this burden which the Constitution has

placed upon the prosecution. *See In re Winship*, 397 U.S. 358 (1970).

But, argues respondent, once a suspect appears to be loitering, he bears the burden of justifying his presence; if he cannot establish that he is innocent of any wrongful conduct, he will be found guilty. The first prong of respondent's argument is simply a refashioning of his contention that the ordinance makes innocent conduct illegal (RB 24-25). The crux of his argument is not that the ordinance creates an invalid presumption for use at trial; rather, it is that loitering or wandering, being innocent behavior, cannot constitute a crime and that therefore Officer Lattin should not have questioned a man who appeared to have been loitering. The problem with respondent's position is that the offense defined by the ordinance includes more than the single element of loitering. The law is violated if a person: (1) loiters without apparent reason; (2) refuses to identify himself; *and* (3) refuses to account for his presence when the circumstances justify such disclosure. To say that an innocent act by itself cannot be a crime misses the point. Entrance into a public building is also innocent conduct; it becomes criminal if the person entering has an intent to commit a felony. It should be apparent that respondent's claim that the ordinance creates an invalid presumption is specious.[1]

[1]This contention presents the subsidiary argument that the officer's conduct in detaining and questioning respondent upon observing his suspicious behavior was unreasonable. That argument must founder on the shoals of the District Court's finding that there was probable cause to arrest respondent. We do not perceive how an arrest based upon probable cause can be unreasonable.

The second prong of respondent's argument—that he must explain his presence or else be convicted of violating the ordinance—is also a restatement of an argument previously made. The requirement that a suspect identify himself and justify his presence does not relieve the prosecution of proving beyond a reasonable doubt all elements of the offense. Respondent is actually contending that the requirement of disclosure violates his privilege against self-incrimination. That argument has already been refuted.

Adverting to respondent's claim that the ordinance has a chilling effect on the right to interstate travel (RB 25-26), we again point out that this argument was not raised in the lower courts and should not be considered by this Court. Addressing the merits, we note that this Court has declared, "that the States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect interstate commerce." *Edwards v. California*, 314 U.S. 160, 172-73 (1941). We submit that the City of Henderson was justifiably concerned about persons who had no lawful business and who refused to disclose their identities or their reasons for being in that municipality. To argue that the vagrancy ordinance trenches upon the right to travel interstate is to assert that all penal statutes suffer from the same constitutional invalidity. Respondent's position must be rejected.

We will assume, without conceding, that the ordinance is constitutionally infirm for one or more of the reasons above discussed. The pertinent inquiry is not

whether the ordinance was invalid, but whether Officer Lattin or any police officer "had knowledge, or may properly be charged with knowledge," that the law violated constitutional guarantees. *United States v. Peltier,* 422 U.S. 531, 542 (1975). We submit that no police officer can be charged with the knowledge which may be gleaned by a scholar in constitutional law only after many hours of diligent research and creative ratiocination. Respondent may be a constitutional innovator, but there is no reason why policemen should be. Officer Lattin was entitled to assume that the ordinance, whose validity had never been questioned as of February 18, 1968, was constitutional and that it defined a public offense which the respondent was committing. Any infirmities in the ordinance are simply irrelevant to the disposition of this case.

B. Respondent's statements to Officer Lattin were not coerced.

Although petitioner maintains that the arrest of respondent was reasonable even if the ordinance was unconstitutional, it is necessary to discuss again the claim that the law violated the privilege against self-incrimination. If the answers of respondent were coerced, or if his silence was an invocation of his right not to incriminate himself, the facts constituting probable cause to arrest were tainted and the arrest and search would consequently be unlawful. *See Wong Sun v. United States,* 371 U.S. 471 (1963).

The record establishes that Officer Lattin could not have relied upon respondent's silence in assessing probable cause because respondent was never silent. Respondent answered all of the questions which the police officer asked (App. 8-19). As respondent did not exercise his privilege against self-incrimination *(cf. Griffin v. California,* 380 U.S. 609 [1965]), he cannot now claim he was penalized for having done so.

Turning to the related argument that his statements to Officer Lattin were coerced, we submit that there is no evidence in the record to establish that respondent's answers were involuntary. Officer Lattin was not obliged to advise respondent of his constitutional right to remain silent, for *Miranda v. Arizona,* 384 U.S. 436 (1966), does not apply to non-custodial, on-the-street questioning. *Id.* at 477-78; *see Schneckloth v. Bustamonte,* 412 U.S. 218, 232, 245, 247-48 (1973); *United States v. Tobin,* 429 F.2d 1261, 1262-64 (8th Cir. 1970); *United States v. Diaz,* 427 F.2d 636, 638 (1st Cir. 1970); *United States v. Hall,* 421 F.2d 540 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970); *Lowe v. United States,* 407 F.2d 1391 (9th Cir. 1969); *United States v. Gibson,* 392 F.2d 373 (4th Cir. 1968); *Allen v. United States,* 390 F.2d 476, 478-79 (D.C. Cir. 1968); *United States v. Messina,* 388 F.2d 393, 395 (2d Cir.), *cert. denied,* 390 U.S. 1026 (1968).

Nor is there any indication that respondent's replies to the officer's inquiries were involuntary in the traditional sense of the term. Indeed, he does not even contend that "his will [was] overborne [or] his capacity for self-determination critically impaired. . . ." *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). Rather, respondent willingly answered questions posed by a police officer who was merely attempting to ascertain his identity and the reason for his

presence in Henderson, Nevada. Thus, respondent's statements, which partially served to establish probable cause for arrest, were freely made. As no information known to Officer Lattin was tainted by illegality, the arrest and search were lawful.

C. The enactment of a statute cannot violate the Fourth Amendment.

Respondent professes surprise akin to shocked disbelief at our position that the enactment of a statute cannot violate the terms of the Fourth Amendment, which prohibits unreasonable searches and seizures. He apparently has interpreted our argument to mean that a legislature can authorize a violation of the Fourth Amendment by the passage of a law (RB 34-37). If that is his understanding of our position, we wish to disabuse him of his misapprehension. We again acknowledge, as we did in the Petitioner's Brief (at 16, 17 n.4), that an otherwise unconstitutional search cannot be made lawful by a statute. *E.g., Almeida-Sanchez v. United States,* 413 U.S. 266, 272 (1973). A legislature obviously cannot authorize what the Constitution forbids. We contend only that the *enactment,* as opposed to the *implementation,* of a statute cannot violate the Fourth Amendment because the provisions of that amendment are specifically aimed at the conduct of law enforcement officers, who conduct searches and seizures, and magistrates, who issue warrants. The passage of a statute, without more, cannot violate the Fourth Amendment because no person has been arrested or searched; no one's privacy has yet been ruptured. If, as respondent

contends, the enactment of a statute can violate the Fourth Amendment rights of every person, then everyone within the political entity governed by the legislature would have standing to challenge the law—a proposition which the respondent expressly denies (RB 56-59).

The conceptual flaw of respondent's position becomes obvious from an analysis of the reasons given by the Court of Appeals in support of its holding that the ordinance violated the Fourth Amendment. First, the court declared that the ordinance

> "authorizes arrest *and conviction* for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest *and conviction* for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense." *Powell v. Stone,* 507 F.2d 93, 96 (9th Cir. 1974) (emphasis added).

It is true that innocent or suspicious conduct cannot be made criminal, but enactment of such statutes is forbidden by the Due Process Clause of the *Fifth* Amendment. The court found that the ordinance permitted conviction for suspicious conduct, but did not recognize that the Fourth Amendment is inapplicable to the validity of convictions. If the Court of Appeals is correct that the ordinance does not define a constitutionally valid substantive offense, it is because

the Due Process Clause, not the Fourth Amendment, proscribes such laws.

Second, the court held that the ordinance was so vague that its provisions could never permit a reasonable man to believe that it had been violated. 507 F.2d at 96-97. The court was actually saying that probable cause did not exist for the arrest of respondent under the provisions of the ordinance. If in fact probable cause was lacking, then the arrest was invalid under familiar Fourth Amendment principles. *E.g., Beck v. Ohio,* 379 U.S. 89 (1964). However, that conclusion cannot stand in light of the District Court's factual finding that Officer Lattin had probable cause to arrest respondent.[2]

In sum, the holding of the Court of Appeals—adopted by respondent—that the ordinance violated the Fourth Amendment was both conceptually untenable and factually incorrect. The cases cited by respondent do not compel a contrary conclusion. In *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975); *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Sibron v. New York,* 392 U.S. 40 (1968); and *Stanford v. Texas,* 379 U.S. 476 (1965), the search,

[2]Respondent argues that there can never be probable cause under an unconstitutional statute (RB 39). His argument obviously paints with too broad a brush. A law prohibiting women from entering public buildings is constitutionally repugnant, yet there can be probable cause to believe that a woman is entering a public building. If respondent intends to take the more modest position that probable cause cannot exist under a vague statute, we reply that he has failed totally to refute our analysis at pages 21-23 of the Petitioner's Brief. We submit that his failure underscores the validity of our position.

not the authorizing statute, was found to have violated the Fourth Amendment. Indeed, *Sibron* declares expressly that the "question in this Court upon review of a state-approved search or seizure 'is not whether the search [or seizure] was authorized by state law. The question is rather whether the *search* was reasonable under the Fourth Amendment.'" 392 U.S. at 61 (emphasis added). *See also Berger v. New York,* 388 U.S. 41 (1967) (semble).

See v. Seattle, 387 U.S. 541 (1967); and *Camara v. Municipal Court,* 387 U.S. 523 (1967), held that a person cannot be prosecuted for asserting his right to be free from an unreasonable search and seizure. But not until an unconstitutional invasion was threatened by authorities were the defendants compelled to assert their rights. In *Boyd v. United States,* 116 U.S. 616 (1886), the production of documents was the constitutional equivalent of a coerced consent to search. *Cf. Bumper v. North Carolina,* 391 U.S. 543 (1968); *see also United States v. Dionisio,* 410 U.S. 1, 8-16 (1973); *Hale v. Henkel,* 201 U.S. 43, 76-77 (1906).

We reiterate that the existence of a law cannot violate the Fourth Amendment. Not until an unconstitutional invasion of a person's property or effects is conducted or threatened do the provisions of the Fourth Amendment become applicable. The ordinance of Henderson, Nevada, standing alone, did not violate the Fourth Amendment. The relevant inquiries are whether Officer Lattin's conduct violated that amendment and whether any useful purpose would be served by suppressing the evidence which he found.

D. Suppression of evidence would not deter police misconduct.

We again acknowledge that a statute cannot make lawful an unconstitutional search. However, the existence of a statute is relevant in determining the legal ramifications of an unlawful search. *United States v. Peltier, supra,* teaches that suppression of evidence is inappropriate if police officers reasonably and in good faith have relied upon a statute authorizing a search or seizure. Respondent argues that this principle would permit the use of any evidence found pursuant to the execution of a statute until that statute is invalidated. Thus, even if the law is obviously unconstitutional, the evidence would still be admitted at trial (RB 42).

Respondent has again misconceived our position. Reliance must not only be *actual,* it must also be *reasonable.* We will use as an illustration respondent's suggested statute which makes it unlawful to be Mexican (RB 42). We concede that an arrest under that law would be unreasonable because reliance upon such a statute, no matter how genuine, would be unreasonable. We argue that police officers cannot be constitutional scholars, but we do not contend that they may live in a social or political vacuum. *Peltier* contemplates that, under certain circumstances, policemen "may properly be charged with knowledge" that a search was unconstitutional. 422 U.S. at 542. It is clear that an officer should know that it cannot be made unlawful to be Mexican and that he cannot arrest a person for that "crime." It is also clear that the ordinance in the instant case does not descend to

that level. As there was reasonable and good-faith reliance upon the ordinance, the purpose of deterring police misconduct would not be served by excluding the evidence.[3]

E. No other recognized purpose would be served by the suppression of evidence.

Respondent tells us that deterrence of police misconduct is not the only purpose to be served by the exclusionary rule. First, suppression is the necessary

[3]If the purpose of the exclusionary rule is to deter police misconduct it is pertinent to ask why evidence seized pursuant to an invalid search warrant is suppressed. In that situation police have not engaged in misconduct in the ordinary sense of the word; they have relied upon a judicial determination of probable cause. Several possible answers suggest themselves. First, the police officer executing the warrant is charged with the knowledge that the facts in the affidavit do not establish probable cause. Thus, he is held to know that he should not conduct the search.

Second, since the Fourth Amendment specifically prohibits search warrants issued upon less than probable cause, evidence seized during the execution of such warrants should be suppressed. *See United States v. Peltier, supra,* 422 U.S. at 558 n.18 (Brennan, J., dissenting). In light of the English and Colonial experience with general warrants and writs of assistance (*see Marcus v. Search Warrant,* 367 U.S. 717, 724-29 [1961]; *Frank v. Maryland,* 359 U.S. 360, 363-66 [1959]), suppression of evidence would seem to be historically compelled.

Third, a mistrust of magistrates, some of whom may acquiesce in the issuance of any search warrant sought by the police, may leave courts reluctant to hold that evidence seized under an invalid warrant may be admissible.

None of these reasons is convincing. Police are constantly encouraged to secure warrants before conducting searches. It would be an intolerable burden to require that they also second-guess the magistrate's finding of probable cause. Police should be permitted to rely upon the magistrate's assessment of the facts; probable cause is essentially a legal question.

It is true that the Fourth Amendment was adopted to forbid the issuance of warrants upon less than probable cause. However, the exclusionary rule was not engrafted onto the amendment until this Court decided *Weeks v. United States,* 232 U.S. 383 (1914). The question is what the exclusionary rule requires. If no deterrent purpose is served by suppression of evidence, it is meaning-

concomitant to judicial review of an invalid search. Next, the imperative of judicial integrity requires that evidence tainted by illegality be suppressed. Finally, legislatures can be deterred from enacting invalid measures only by excluding evidence from trial (RB 42-52).

The argument that judicial review requires suppression of evidence taken during an unconstitutional search is fully set forth in the provocative article, Schrock and Welsh, *Up from* Calandra: *The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L.Rev. 251, 355-66 (1974). The authors argue that the Constitution requires "that unconstitutional behavior of a governmental actor be declared invalid and void if brought before a court." *Id.* at 359. Invalidation of an illegal search, according to this thesis, requires that the fruits of the search be excluded from evidence. That argument proceeds from the premise, as the authors candidly admit *(id.* at 302, 319), that a defendant has a personal right to the exclusion of evidence, a proposition which this Court has expressly

less to exclude evidence simply because it was seized pursuant to an invalid warrant.

Neither should evidence be suppressed to deter magistrates from issuing warrants upon less than probable cause. The issuance of an invalid warrant typically occurs as a result of legal misjudgment; suppression of evidence, with the consequent setting free of guilty men, is far too drastic a remedy for an innocent mistake. Should the criminal go free because the magistrate has blundered? *Cf. People v. Defore,* 242 N.Y. 13, 21, 150 N.E. 585 (1926).

We recognize that this case is an inappropriate vehicle for the reexamination of the application of the exclusionary rule to warranted searches. *But see Wolff v. Rice,* USSC No. 74-1222. We nevertheless submit that suppression of evidence seized pursuant to a warrant rarely, if ever, serves the purpose of the rule.

repudiated. *United States v. Peltier, supra,* 422 U.S. at 538; *United States v. Calandra,* 414 U.S. 338, 347 (1974); *Linkletter v. Walker,* 381 U.S. 618, 637 (1965). It is too late in the day to resurrect that argument.

Judicial integrity, a nebulous concept at best, does not demand exclusion. *Peltier* explains that this rationale is "not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that the conduct of the type engaged in by law enforcement officials is not permitted by the Constitution." 422 U.S. at 538. As Officer Lattin reasonably believed that the arrest under a presumptively valid ordinance was lawful, suppression of evidence would not vindicate judicial integrity.

Respondent's last justification for the exclusion of evidence is to deter legislatures from passing unconstitutional laws. Petitioner replies that this Court has stated explicitly that *"the purpose* of the exclusionary rule is to deter unlawful police conduct" *(United States v. Peltier, supra,* 422 U.S. at 542 [emphasis added]), not legislative misjudgment. Reason supports the limitation of the sanction of suppression to police misbehavior. As a practical matter, police officers can be advised that their conduct has violated the Fourth Amendment only by exclusion of the evidence which they seized during the violation. There is no other available official sanction. By contrast, a

legislature can be told that its laws are constitutionally repugnant by the invalidation of those measures. There should be a symmetry between the violation and the sanction. The fruits of police misconduct are evidence; the evidence should be excluded. The fruits of legislative misjudgment are unconstitutional statutes; the statutes should be rendered unenforceable.

But, argues respondent, if "this Court suppresses the evidence seized under the Henderson ordinance, then it is unlikely that any legislative body—local, state or federal—is again going to adopt a vagrancy ordinance like the Henderson one only to see arrests and searches under it invalidated and the evidence suppressed" (RB 52). Respondent asserts that invalidation plus suppression will make it even less likely that legislatures will pass such laws, but he has not proven his case. Simply put, he has not explained why the town council of Henderson or any legislative body will be more impressed by suppression and invalidation than they will be by invalidation alone. Suppression is superfluous in this case. This Court should not reverse a murder conviction on the outside—and unproven—chance that otherwise legislatures will not take its pronouncements seriously.

Respondent argues further that the "legislative history" of vagrancy laws indicates they are enacted to allow officers to conduct arrests and searches on less than probable cause. (RB 53 & n.26). This argument proceeds from the premise that each

legislature which has passed a vagrancy law has done so with the knowledge that it was constitutionally defective. Respondent's assumption is profoundly disturbing because its attribution of bad faith to all legislatures is a rejection of one of the cornerstones upon which democratic government is based. Respondent asks this Court to assume that legislatures—all legislatures—cannot be trusted and that only the federal judiciary is solicitous of the personal liberties of American citizens. We respectfully ask this Court to reject such an irresponsible and antidemocratic assumption.

Nor does the legislative history of the ordinance support respondent's cabalistic view. The ordinance is based upon a state statute (NRS § 207.030(h)) and conforms to a measure proposed by a scholar who commented that it "requires serious and careful consideration because of the practical necessities of police responsibility for the preservation of law and order." Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision,* 48 Calif. L.Rev. 557, 571 (1960). Furthermore, enactment of the ordinance antedates by several years this Court's decision in *Papachristou v. Jacksonville,* 405 U.S. 156 (1972). In light of legislative leadership, scholarly encouragement, and judicial silence, any claim that the ordinance was enacted in bad faith is untenable.

Respondent argues alternatively that no one is ever prosecuted under vagrancy laws and that therefore

those laws can be challenged only by a motion to suppress evidence seized pursuant to an arrest for vagrancy or loitering. Respondent's factual premise is totally undermined by empirical data. In the last few years the constitutionality of vagrancy and loitering laws has become a fertile area for litigation, either after conviction or upon a threat of prosecution. *E.g., Papachristou v. Jacksonville,* 405 U.S. 156 (1972); *Palmer v. Euclid,* 402 U.S. 544 (1971); *Shuttlesworth v. Birmingham,* 382 U.S. 87 (1965); *United States v. Cassiagnol,* 420 F.2d 868 (4th Cir), *cert. denied,* 397 U.S. 1044 (1970); *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968); *Cantrell v. Folsom,* 332 F.Supp. 767 (M.D. Fla. 1971); *Scott v. District Attorney,* 309 F.Supp. 833 (E.D.La. 1970), *aff'd,* 437 F.2d 500 (5th Cir. 1971); *United States v. Sroka,* 307 F.Supp. 400 (E.D.Wis. 1969); *State ex rel. Williams v. City Court,* 21 Ariz.App. 489, 520 P.2d 1166 (1974); *People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973); *In re Nancy C.,* 28 Cal.App.3d 747, 105 Cal.Rptr. 113 (1972); *People v. Gibson,* 521 P.2d 774 (Colo. 1974); *Arnold v. Denver,* 171 Colo. 1, 464 P.2d 515 (1970); *Wallace v. State,* 224 Ga. 255, 161 S.E.2d 288 (1968); *Soles v. Vidalia,* 92 Ga.App. 839, 90 S.E. 2d 249 (1955); *State v. Grahovac,* 52 Hawaii 527, 556, 480 P.2d 148 (1971); *Henrichs v. Hildreth,* 207 N.W. 2d 805 (Ia. 1973); *State v. Aucoin,* 278 A.2d 395 (Me. 1971); *Knowlton v. State,* 257 A.2d 409 (Me. 1969); *People v. Ritchey,* 25 Mich.App. 98, 181 N.W.2d 87 (1970); *People v. Wedlow,* 17 Mich.App. 134, 169 N.W.2d 145 (1969); *State v. Armstrong,* 162 N.W.2d

357 (Minn. 1968); *State v. Hudson,* 111 N.H. 25, 274 A.2d 878 (1971); *State v. Caez,* 81 N.J.Super. 315, 195 A.2d 496 (1963); *People v. Berck,* 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, *cert. denied,* 414 U.S. 1093 (1973); *People v. Lewis,* 70 Misc.2d 41, 332 N.Y.S.2d 929 (1972); *People v. Willmott,* 67 Misc.2d 709, 324 N.Y.S.2d 616 (1971); *People v. Strauss,* 66 Misc.2d 268, 320 N.Y.S.2d 628 (1971); *People v. Taggart,* 66 Misc.2d 344, 320 N.Y.S.2d 671 (1971); *People v. Villaneuva,* 65 Misc.2d 484, 318 N.Y.S.2d 167 (1971); *Hayes v. Municipal Court,* 487 P.2d 974 (Okla. Crim. 1971); *Portland v. James,* 251 Or. 8, 444 P.2d 554 (1968); *Portland v. White,* 9 Or.App. 239, 495 P.2d 778 (1972); *Commonwealth v. Duncan,* 456 Pa. 495, 321 A.2d 917 (1974); *State v. Jamgochian,* 109 R.I. 17, 279 A.2d 923 (1971); *Seattle v. Pullman,* 82 Wash.2d 794, 514 P.2d 1059 (1973); *Seattle v. Jones,* 79 Wash.2d 626, 488 P.2d 750 (1971); *State v. Fisk,* 79 Wash.2d 318, 485 P.2d 81 (1971); *Seattle v. Drew,* 70 Wash.2d 405, 423 P.2d 522 (1967); *State v. Oyen,* 4 Wash.App. 273, 480 P.2d 766 (1971).

We believe that persons are still prosecuted for these offenses throughout the country. If the laws are invalid, defendants may vindicate their constitutional rights by a challenge to the state prior to trial, or direct appeal, or by federal habeas corpus. The indigency of the defendants is no longer an insurmountable obstacle to the successful challenge to the legitimacy of vagrancy and loitering laws. *See Argersinger v. Hamlin,* 407 U.S. 25 (1972).

F. The case-or-controversy clause does not require suppression.

Lastly, respondent argues that the evidence be suppressed and a new trial granted because the case-or-controversy clause (U.S. Const. Art. III, § 2) requires that result (RB 58-59). The core of his argument is that if the arrest and search were unlawful, it necessarily follows that the evidence must be suppressed. Respondent's implicit premise is that a person who is the victim of an illegal search has a personal right to the suppression of its fruits. This Court has repudiated that view. The Fourth Amendment and the exclusionary rule are not coextensive. *United States v. Calandra,* 414 U.S. 338 (1974). To determine whether exclusion is appropriate two questions must be resolved: (1) Were the defendant's rights under the Fourth Amendment violated? (2) Would the societal interest in deterring police misconduct be served by excluding the fruits of the search?

In this case the violation of respondent's rights (the first issue) does not require the suppression of evidence because no societal interest would be served thereby (the second issue). The case-or-controversy requirement is satisfied by determining the relief to which respondent is entitled. He has no right to any relief; a decision by this Court so holding will define his rights in the context of this case and will therefore satisfy the case-or-controversy requirement.

Respondent presents a related argument, based on policy considerations, that he should be given relief to encourage other defendants, who are similarly situated, to challenge the legality of the statute under

which they are arrested (RB 59-60). If they know that will receive no redress despite the statutes' invalidity, they will not bother to mount an attack. We disagree.

Petitioner has argued that the arrest under an unconstitutional statute must be reasonable and in good faith. The invalidity of a statute is relevant in the determination of both questions. Thus, a trial court may find that an officer's arrest under an obviously invalid law was in bad faith, made as a pretext for a search. *Cf. United States v. Lefkowitz,* 285 U.S. 452 (1932). The statute could be so lacking in criteria that probable cause for an arrest would be almost a legal impossibility. *Cf. Younger v. Harris,* 401 U.S. 37, 53-54 (1971). Once the defendant has established the invalidity of the law, the prosecution would bear the burden of showing that the arrest was reasonable and in good faith. Failure to carry the burden would result in suppression. In this case the burden was met. The evidence was properly admitted.

II

SEARCHES MADE IN REASONABLE RELIANCE UPON A COORDINATE BRANCH OF GOVERNMENT SHOULD NOT BE COGNIZABLE UNDER 28 U.S.C. § 2254

Respondent argues that the Habeas Corpus Act of 1867 was enacted to permit state prisoners to relitigate all federal claims in federal court (RB 74-78). We submit that Congressional intent in passing the Act is far from clear. It is doubtful that it was in-

tended to vindicate the due process rights of state prisoners because in 1867 those rights were nonexistent. Even assuming that to be the purpose of federal habeas corpus, we submit that Fourth Amendment claims of state prisoners could not be considered on collateral review because the purpose of the exclusionary rule is to deter police misconduct, not to vindicate due process.

Adverting to the claim that Congressional inactivity indicates its approval of the cognizability of Fourth Amendment claims on habeas corpus (RB 79-82), we respond that this Court did not decide *Kaufman v. United States,* 394 U.S. 217, until 1969, three years after the law was last amended. Congress's subsequent failure to amend the habeas corpus statute cannot relieve this Court of its obligation to determine whether the deterrent purpose of the exclusionary rule, a judicially fashioned remedy, is served by its application on federal habeas corpus.

Respondent's policy arguments are not convincing (RB 84-92). He assumes, rather than proves, that federal review of federal questions is necessary to protect Fourth Amendment values (RB 87-88). The uniformity of decision which he seeks by federal review is probably an illusory objective. Respondent's attempt to minimize the burden placed upon federal courts is based on the premise that they need do no more than review transcripts of state hearings and "correctly" apply the law to achieve a "just" result (RB 90). He does not recognize that many prisoners have failed to litigate their constitutional claims in

state court; if the state cannot establish a knowing and deliberate bypass, the prisoner will be entitled to an evidentiary hearing on the merits. This burden, no matter how insignificant relative to the balance of the workloads of federal courts, is intolerable in light of the absence of proof that suppression of evidence on habeas corpus has any deterrent value.

Respondent argues that innocence is an irrelevant question in the context of federal habeas corpus, which is designed to vindicate due process (RB 92). However, since suppression of evidence does not vindicate due process and, on collateral review, probably does not deter future police misconduct, we submit that the cognizability on habeas corpus of Fourth Amendment questions is justified only if the prisoner can make a colorable claim of innocence. Respondent has not done so in this case.

Respondent's claim that adoption of our position would be untenable in light of *Lefkowitz v. Newsome,* 420 U.S. 283 (1975), is specious (RB 94). *Newsome* simply holds that a plea of guilty by a state defendant does not foreclose consideration of his federal claims on federal habeas corpus if the state law permits a plea of guilty without a consequent forfeiture of appellate review of specified constitutional issues. The rule of *Newsome* is procedural; it does not bear upon the substantive issue whether Fourth Amendment claims should be raised *at all* on federal habeas. If this Court decides to overrule *Kaufman,* it would mean that no search and seizure claims by state prisoners, whether they pleaded guilty or were convicted

upon a plea of not guilty, would be cognizable. *Newsome* would still retain vitality, for all *other* federal questions could still be raised by state prisoners if the state has a statute similar to those of New York and California.

Finally, respondent argues that this search in the instant case should be cognizable. He contends that no guidelines exist to distinguish between "wanton" and "technical" violations (RB 96-97), that the violation in this case was gross (RB 97), and that the officer's reliance upon the ordinance cannot validate the search (RB 99). Petitioner replies that a technical violation has occurred when the policeman making the search or seizure has reasonably and in good faith relied upon a coordinate branch of the government, either the legislature or the judiciary. The violation in this case was technical. Reliance upon the statute cannot validate the search, but it does make inappropriate suppression of the evidence and reversal of the conviction.

A. Neither the historical nor modern function of habeas corpus renders search claims cognizable on collateral review.

Although it is probably too late in the day to question this Court's revisionist view of the purpose of habeas corpus *(see Fay v. Noia,* 372 U.S. 391 [1963]), we feel compelled to note that it was almost certainly not intended to be a functional writ of error for relitigation of federal questions arising in state courts. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 250-56 (1973) (Powell, J., concurring); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State*

Prisoners, 76 Harv. L. Rev. 441, 463-507 (1963); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U.Chi. L.Rev. 31, 33-58 (1965); Oaks, *Legal History in the High Court—Habeas Corpus,* 64 Mich. L. Rev. 451, 458-68 (1966). This Court has declared: "Vindication of due process is precisely [the writ's] historic office." *Fay v. Noia, supra,* 372 U.S. at 402. However, there is ample reason "to doubt that the draftsman of the habeas measure, or any of its proponents, had in mind its possible utilization as a remedy for denials of due process of law or of equal protection of the laws. This could have been their intention only if they foresaw an expansion of the due process clause that was still decades in the future." *Mayers, supra,* at 54 (fn. omitted). In *Fay,* this Court offered no evidence to indicate why it believes that the Congress of 1867 was gifted with a collective prescience of mind.

Even assuming that habeas corpus was intended to be a vindicator of due process, it is still not apparent to petitioner why Fourth Amendment claims may be considered on federal collateral review. The exclusionary "rule is a judicially created remedy *designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.*" *United States v. Calandra, supra,* 414 U.S. at 348 (emphasis added). A defendant has no due process right to suppression of evidence seized during an illegal search; he is at most an incidental beneficiary. Exclusion of evidence is a societal right. If, then, sup-

pression does not vindicate due process, we do not perceive how evidence can be ordered suppressed on federal habeas corpus. The remedy is inappropriate to the purpose of the writ, which is designed to vindicate personal, not societal, rights. If no defendant has a personal right to exclusion, no federal court has jurisdiction to suppress evidence on collateral review.

B. Congressional acquiescence does not relieve this Court of its obligation to determine whether the purpose of the exclusionary rule can be served on habeas corpus.

Respondent observes that Congress did not withhold from federal courts jurisdiction over search and seizure claims on the last occasion that it amended section 2254 and that it has declined all recent invitations to do so. Respondent concludes that Congressional inactivity manifests its approval of relitigation of Fourth Amendment questions on federal collateral review (RB 79-82).

With regard to the failure of Congress to withhold jurisdiction in 1966 over search claims, we note that this Court at that time had not ruled definitively that habeas corpus relief was available to a state prisoner who alleged a Fourth Amendment violation. A majority of the federal decisions had held that search questions were not cognizable under sections 2254 and 2255. *See Schneckloth v. Bustamonte, supra,* 412 U.S. at 272 (Powell, J., concurring); *Kaufman v. United States, supra,* 394 U.S. at 220-21, nn. 3-4.

Congress's subsequent inaction does not necessarily betoken approval. Inaction may mean only

"that Congress does not intend to act at all. . . . In short, although recognizing that by silence Congress at times may be taken to acquiesce and thus approve, we should be very sure that, under all the circumstances of a given situation, it has done so before we so rule and thus at once relieve ourselves from and shift to it the burden of correcting what we have done wrongly. The matter is particular, not general, notwithstanding earlier exceptional treatment and more recent tendency. Just as dubious legislative history is at times much overriden, so also is silence or inaction often mistaken for legislation." *Cleveland v. United States,* 329 U.S. 14, 23-24 (1946) (Rutledge, J., concurring).

More fundamentally, respondent has misconceived the relevant inquiry, which is whether the exclusionary rule, a judicially created device, will efficaciously serve its remedial objectives on federal habeas corpus. Just as this Court has created the rule, so also it must determine in what context the rule will be applied. We have argued that the deterrent value of the exclusionary rule on collateral review is so speculative as to be unproven (Brief of Petitioner at 39-45). The rule was never intended to vindicate due process. If this Court agrees with these conclusions, it must overrule *Kaufman,* for no purpose would be served by the suppression of evidence on collateral review. The effectiveness of the exclusionary rule, not the scope of section 2254, is at issue here. That question, in the first instance, must be decided by this Court, not Congress.

C. Respondent's policy arguments do not justify the continuing vitality of Kaufman.

Respondent argues that a balance of the relevant policy considerations militates in favor of the continuing cognizability of search and seizure claims on federal habeas corpus (RB 84-92). At the outset we note that the balancing technique in constitutional adjudication is a subtle and subjective process. At most, litigants can identify and analyze the factors to be weighed in the balance. This Court must determine the value which must be accorded to each of the components. It is the assignment of value, not the mere identification of the considerations, which ultimately determines the resolution of the constitutional question.

Respondent contends that the overruling of *Kaufman* would result in the erosion of the Fourth Amendment by hostile state judiciaries and hopeless confusion in national Fourth Amendment jurisprudence (RB 87-88). *See* Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?,* 61 Geo. L.J. 1221, 1226, 1251 (1973); *Developments in the Law—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1057-61 (1970); Note, *Federal Habeas Corpus For State Prisoners and the Fourth Amendment,* 52 N.Car. L. Rev. 633, 640 (1974). Stated more fully, respondent's first argument is that this Court is unable to consider on certiorari more than a small fraction of the state cases involving Fourth Amendment issues; thus, this function must be performed by federal courts on habeas corpus. If it is

not, state judiciaries may subvert Fourth Amendment values.

This argument proceeds from the assumption that all federal claims must ultimately be decided by a federal court, a proposition apparently not free from doubt. *See Huffman v. Pursue, Ltd.,* 420 U.S. 592, 606 & n. 18 (1975). Respondent's second assumption is that a significant number of state courts are unwilling to suppress evidence if it would free guilty defendants. We share Mr. Justice Powell's opinion that this ground of concern is less realistic than in years past. *Schneckloth v. Bustamonte, supra,* 412 U.S. at 260 n.13 (Powell, J., concurring). As a ready example, we observe that several state courts have invalidated searches which would be permissible under *United States v. Robinson,* 414 U.S. 218 (1973). *See People v. Brisendine,* 13 Cal.3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *States v. Kaluna,* 55 Hawaii 361, 520 P.2d 51 (1974); *People v. Copeland,* 77 Misc.2d 649, 354 N.Y.S.2d 399 (1974); *People v. Kelly,* 77 Misc.2d 264, 353 N.Y.S.2d 111 (1974). We simply cannot accept respondent's facile assumption that states are unconcerned with their citizens' right to privacy. If that were true, the adoption of the exclusionary rule by over one-half of the states prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), becomes inexplicable. *See Elkins v. United States,* 364 U.S. 206, Appendix 224-32 (1960).

Turning to the argument that federal collateral review will promote uniform application of federal law, we do not perceive why 94 district courts and

11 circuit courts will achieve this objective more successfully than state tribunals. *See Annual Report of the Director of the Administrative Office of the United States Courts—1974* at 213 (1975); C. Wright, *Law of Federal Courts* §3 at 8 (2d Ed. 1970). The belief that only federal courts could achieve uniformity of decision on federal questions led to this Court's decision in *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842). *See* R. Leflar, *American Conflicts Law* 149-50 (1968). That theory did not receive its quietus until a century later. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). We ask this Court not to resurrect a doctrine so deservedly buried.

Respondent's doubts that relitigation of Fourth Amendment issues on federal habeas corpus produces an excessive workload is based upon the assumption that federal courts need only review transcripts of the state suppression hearings to arrive at their decisions (RB 90). He does not realize that failure to raise a constitutional issue in state court does not necessarily foreclose its litigation on habeas corpus. *See Fay v. Noia,* 372 U.S. 391, 439 (1963). Thus, a state prisoner may be entitled to an evidentiary hearing years after the search has occurred; as a result, "the validity of a search-and-seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter. . . ." *Schneckloth v. Bustamonte, supra,* 412 U.S. at 263 (Powell, J., concurring).

Additionally, respondent's calculus ignores the time and energy which the state agencies must expend in

their overwhelmingly successful attempts to refute the contentions of the habeas petitioners. *See* Note, *supra,* 61 Geo. L.J. at 1251 n.202 (relief granted in 4 per cent of the cases). Finally, no matter how seemingly insignificant is the burden upon the administration of justice, it is unjustifiable if it serves no purpose.

D. Fourth Amendment claims of state prisoners should be cognizable on federal habeas corpus only if the state has not afforded an adequate corrective process or if the petitioner can allege his innocence in good faith.

Respondent contends that the innocence of a prisoner is irrelevant to the question whether the writ of habeas corpus is available, since the function of the writ is to vindicate due process (RB 92). We submit that, since exclusion of evidence cannot vindicate due process, the litigation of Fourth Amendment questions on collateral attack must be justified on some other basis, if at all.

We propose two possible justifications. First, if the state has not provided an adequate corrective process (*cf. Frank v. Mangum,* 237 U.S. 309 [1915]), then federal courts are obliged to provide a forum for the litigation of the federal claim. This availability is not based upon the right to vindicate a substantive due process claim; rather, it rests upon the procedural due process right of access to the courts. *Cf. Johnson v. Avery,* 393 U.S. 483 (1969). If the state has not provided access, the federal courts must do so.

Second, the suggestion that the contention of constitutional error be supplemented with a "colorable claim of innocence" (*See* Friendly, *Is Innocence Irre-*

levant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 151-57, 170 [1970]) is based frankly on a value judgment that no innocent man should be imprisoned as a result of a violation of his constitutional rights. The state's interest in finality cannot justify an unjust incarceration.

In the instant case the respondent had the opportunity to litigate the merits of the arrest and search; he has not claimed that he is innocent. Since suppression of evidence will not vindicate any personal due process right, there is no jurisdictional basis for the issuance of the writ.

E. Lefkowitz v. Newsome, 420 U.S. 283 (1975), does not compel consideration of Fourth Amendment claims on federal habeas corpus.

Respondent argues that adoption of petitioner's position that search and seizure claims should not be cognizable on federal collateral review would result in the following anomaly. A state prisoner who has pleaded guilty may raise Fourth Amendment issues on federal habeas corpus. Acceptance of our position would mean that a defendant who has been convicted upon a plea of not guilty would be foreclosed from federal habeas relief. Respondent concludes that the difference in treatment of defendants who have pleaded guilty and those who have been convicted is logically and legally unsupportable (RB 94).

Respondent's argument is based upon a misunderstanding of *Lefkowitz v. Newsome,* 420 U.S. 283 (1975). This Court held in *Newsome* "that when state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding." *Id.* at 293. Although that case arose out of the litigation of a Fourth Amendment claim, this Court did *not* hold that all search and seizure issues must be litigated on their merits on federal review. Rather, *Newsome* stands for the simple proposition that a plea of guilty in a state court, which plea is intended to facilitate state appellate review, does not foreclose future litigation on federal habeas. The unspoken premise of *Newsome* is that the constitutional question is cognizable on habeas corpus. If this Court overrules *Kaufman,* it will mean that no search claim raised by a state prisoner can be litigated on federal habeas, regardless of whether he pleaded guilty or was convicted upon a plea of not guilty. *Newsome* need not be overruled, for all *other* constitutional claims would be cognizable on habeas corpus, provided that the state has enacted a statute permitting defendants who have pleaded guilty to raise specified issues. *See Lefkowitz v. Newsome, supra,* at 285 n.1.

F. Searches made in reliance upon a coordinate branch of the government should not be cognizable on federal habeas corpus.

In the Brief for the Petitioner we argued that the instant search should not be cognizable on federal habeas corpus because it was, at most, a technical violation of the Fourth Amendment (Brief at 45-49). Respondent rejected this claim, arguing that there are no guidelines to distinguish between technical and

gross violations of the prohibition against unreasonable searches and seizures (RB 96-97). We reiterate that a technical violation is one which is the result of a reasonable reliance by the police officer upon a coordinate branch of the government. If the officer making the arrest or search has relied upon a search warrant which was issued upon less than probable cause or upon a statute subsequently declared unconstitutional (*cf. Brown v. Illinois,* 422 U.S. 590, 611-12 [1975] [Powell, J., concurring]), the seized evidence should not be ordered suppressed by a federal court on habeas corpus.

The reasons for this exception are intertwined with the reasons for the exclusionary rule. Ideally, the rule operates to deter police misconduct and to encourage policemen to secure warrants before conducting searches. A police officer who has sought and executed a warrant based upon insufficient information has not committed misconduct; if the evidence is suppressed, he is being punished for doing what this Court has encouraged him to do and he might be reluctant in the future to seek a warrant. Thus, suppression of evidence found during a warranted search will not deter official misbehavior and may have the self-defeating effect of discouraging reliance upon magistrarial judgment.

Similarly, an officer who makes an arrest, based on probable cause, under a presumptively valid statute is not guilty of misconduct. If the evidence is suppressed, he and his fellow officers may be reluctant in the future to enforce validly enacted statutes which

have not passed judicial scrutiny. As a result, officers may not enforce the laws which they have been sworn to uphold. As in the search warrant situation, use of the exclusionary rule becomes self-defeating.

The wisdom of applying the exclusionary rule in the two situations discussed above on direct review is a question not in issue here. We submit that, on federal collateral review, employment of the rule can only have a negative impact. Suppression of the evidence years after it has been seized will chastise the officer for relying upon a search warrant or statute. He and his colleagues will be put on notice that, no matter how reasonable the reliance, it is possible that the defendant may obtain his freedom years afterward. Such a specter can only discourage reliance upon legislatures and magistrates, a reliance which this Court heretofore has encouraged.

Respondent's arguments, that this Court has the obligation to pass upon the validity of state statutes and that a statute cannot validate an unlawful search (RB 99-100), miss the point. Respondent seeks more than the declaration of the ordinance's invalidity; he asks that the evidence be suppressed. That relief should be granted only if it serves some useful purpose. In light of Officer Lattin's reasonable reliance upon the ordinance, suppression would be pointless. We recognize that the ordinance, if invalid, cannot authorize a violation of the Fourth Amendment, but that is not the issue. The question is whether suppression would protect Fourth Amendment values. We submit that it would not.

CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed.

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